United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

In The

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

71

No. 23,048

AARON W. WILLIAMS, Appellant

v.

UNITED STATES OF AMERICA, Appellee

APPEAL FROM A JUDGMENT OF CONVICTION
IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF

FOR

APPELLANT

United States Court of Appeals
for the District of Columbia Circuit

FILED AUG 4 1969

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STATUTES

22 DCC 1801 (b) [1967 Edition. 1969 Supplement II]

Except as provided in subsection (a) of this section, whoever shall, either in the night or in the daytime, break, and enter, or enter without breaking, any dwelling, bank, store, warehouse, shop, stable, or other building or any apartment or room, whether at the time occupied or not, or any steamboat, canalboat, vessel, or other watercraft, or railroad car or any yard where any lumber, coal, or other goods or chattels are deposited and kept for the purpose of trade, with intent to break and carry away any part thereof, or any fixture or other thing attached to, or connected with the same, or to commit any criminal offense, shall be guilty of burglary in the second degree. Burglary in the second degree shall be punished by imprisonment for not less than two years nor more than fifteen years.

22 DCC 2202 [1967 Edition].

Petit Larceny - Order of Restitution.

Whoever shall feloniously take and carry away any property of value of less than $100, including things savoring of the realty, shall be fined not more than $200 or be imprisoned for not more than one year, or both. And in all convictions for larceny, either grand or petit, the trial justice may, in his sound discretion, order restitution to be made of the value of the money or property shown to have been stolen by the defendant and made way with or otherwise disposed of and not recovered.

22 DCC 2204 [1967 Edition].

Unauthorized Use of Vehicles

Any person who, without the consent of the owner shall take, use, operate, or remove, or cause to be taken, used, operated, or removed from a garage, stable, or other building, or from any place or locality on a public or private highway, park, parkway, street, lot, field, inclosure, or space, an automobile or motor vehicle, and operate or drive or cause the same to be operated or driven for his own profit, use, or purpose shall be punished by a fine not exceeding one thousand dollars or imprisonment not exceeding five years, or both such fine and imprisonment.

§ 22-105. Persons advising, inciting, or conniving at criminal offense to be charged as principals.

In prosecutions for any criminal offense all persons advising, inciting, or conniving at the offense, or aiding or abetting the principal offender, shall be charged as principals and not as accessories, the intent of this section being that as to all accessories before the fact the law heretofore applicable in cases of misdemeanor only shall apply to all crimes, whatever the punishment may be.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether on the basis of the meagre and insufficient evidence introduced at trial, it can be said as a matter of law that such evidence was sufficient as to sustain the conviction of the appellant.

2. Whether on this basis of the evidence, the judge can properly be said to have denied a motion for acquittal and let the case go to the jury; whether as a matter of law, a reasonable man could not have had a reasonable doubt as to guilt in the instant case.

This pending case was not previously before this Court, either under the same or a similar Title.

REFERENCES TO RULINGS

March 28, 1969 Ruling of Judge Sirica denying defendant's Motion for Judgment of Acquittal.

In The

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,048

AARON W. WILLIAMS, Appellant

v.

UNITED STATES OF AMERICA, Appellee

Appeal From A Judgment
of Conviction in the
United States District
Court for the
District of Columbia

B R I E F F O R A P P E L L A N T

STATEMENT OF THE CASE

Appellant, Aaron W. Williams, along with two other defendants below, Walter R. Daniels and William H. Fowler, was convicted in the United States District Court for the District of Columbia after trial before the Honorable John J. Sirica, United States District Judge, sitting with a jury on February 4,

1969 under a three count indictment for: Count I, burglary in the second degree (22 DCC 1801 (b)); Count II, petit larceny (22 DCC 2202); and Count III, unauthorized use of an automobile (22 DCC 2204) (TR 165-167).

On March 28, 1969, Judge Sirica, after having reserved decision of the defendants' motions for a judgment of acquittal, granted the motion for a judgment of acquittal made by defendant Daniels and denied similar motions of defendants Williams and Fowler.

Thereupon Judge Sirica sentenced defendant Williams to incarceration for a term of 1-4 years on Count I, 1 year on Count II, and 1-4 years on Count III, said sentences to run concurrently. A timely notice of appeal was filed by appellant Williams on March 28, 1969, Judge Sirica ordering the prosecution of this appeal without prepayment of costs on April 3, 1969. On May 20, 1969, attorney for appellant was notified of his appointment by this Court to prosecute the present appeal, the District Court having included in its order the appropriate certification to this Court.

The Proceedings in the above matter were held before the Honorable John J. Sirica, United States District Judge, sitting with a jury on January 29 and 30, and February 3 and 4, 1969. At the trial, the following evidence was adduced:

(1) That on the morning of April 28, 1969, a 1964 blue Chevrolet Impala, DC Tags 54-444, owned by one Zephrie Scott, was stolen by a group of persons, none of whom the witness was able to identify (TR 7-16).

(2) That the Jacobson Market Liquor Store, owned by the MRY Corporation and located at 924 - 10th Street, N.W., Washington, D.C., was apparently broken into sometime during the early hours of April 28, 1968 and robbed of a quantity of liquor (TR 16-26).

(3) That Officer Thomas Joseph Lawless, a member of the Metropolitan Police Department, assigned to a one-man scout car, came upon the scene and found the above described car parked in front of Jacobson's Market Liquor Store with 2 cases of liquor in the back seat. Officer Lawless saw several persons on the scene - four of whom were arrested. Defendant Daniels was seen near the automobile and fled north on 19th Street (TR 31). Defendant Fowler was observed in the store, and a juvenile was seen emerging from the store (TR 33). Appellant Williams was seen standing outside the store, and according to the testimony of Officer Lawless started to run as Lawless arrived. Williams denies running. At no time was defendant Williams seen inside the store. Officer Lawless

specifically indicated on cross examination that he saw the appellant on the sill, outside the store, but within a recessed area in front of the door. No alcohol was found on his person (TR 52) and there was no evidence to indicate he had entered the store.(TR 49). At no time was any evidence introduced to indicate Williams approached the automobile. No fingerprints of appellant were introduced to connect him with either the automobile or the liquor.

(4) Evidence was also adduced that the front of the store had been boarded up due to the April 1968 riots (TR 17). On direct examination Williams claimed that he was returning to the home of a friend after a party and that he observed a commotion in front of the liquor store. He arrived to take a closer look at the commotion and was almost immediately apprehended by Officer Lawless (TR 93-95).

(5) No other evidence was adduced to connect the defendant with the crime. On the basis of this evidence alone, Judge Sirica denied appellant's motion for a judgment of acquittal and allowed the case to go to the jury. After a guilty verdict was rendered against all three defendants on all three counts, Judge Sirica granted the motion for acquittal as to defendant Daniels and denied it as to defendants Williams and Fowler. In fact Judge Sirica, in the presentencing proceedings of March 28, 1969, indicated that his denial of

appellant's motion for a judgment of acquittal was prompted by his (Williams') presence in the store. "You see one man was found in the store - I think it was Fowler, and Williams was found coming out through a store that had been broken into and started running down 10th Street and the officer called him and he came back." (emphasis supplied) (Supplementary transcript of March 28, 1969, page 4). Appellant respectfully submits that this was an erroneous conclusion since no evidence was adduced to indicate that Williams was ever in the store. In fact, Officer Lawless specifically stated on cross examination that he never saw Williams within the store, only on the sill, in front of, but not in, the store. (TR 49, 52).

Respondent respectfully submits that the Motion for a Judgment of Acquittal was erroneously denied and requests this Court to reverse the judgment of conviction and enter a Judgment of Acquittal as to Appellant Williams.

SUMMARY OF ARGUMENT

I. The Evidence Was Insufficient to Sustain a Conviction of the Offenses Specified In the Indictment (TR 7-16, 32, 37, 48-50, 52, 101-103).

II. The Evidence was Insufficient to Prove Appellant Williams Aided and Abetted the Actual Perpetrators of the Act. (TR 103-105, 125, 130, 149-150).

III. The Lower Court Erred in Denying Appellant's Motion for A Judgment of Acquittal. (TR 6-24, 29-34, 39, 48-50, 64-66, 88-89, 132).

IV. The Trial Judge's Instructions were Inadequate to Delineate the Standard of Reasonable Doubt (135-155).

ARGUMENT

I. THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN A CONVICTION OF THE OFFENSES SPECIFIED IN THE INDICTMENT.

The record below is totally inadequate to sustain appellant's conviction for burglary in the second degree, petit larceny and unauthorized use.

A. Burglary in the Second Degree

The elements required to sustain a conviction of burglary in the second degree are:

> . . . either in the night or in the daytime, break and enter, or enter without breaking any dwelling. . . or other building. . ., whether at the time occupied or not, . . . with intent to . . . commit any criminal offense. 22 DCC 1801 (b), (1967 edition, 1969 Supplement II).

The essential elements of the crime, to wit: entry and intent, are completely lacking in this case. No evidence was introduced to show Williams ever entered the premises. And even if he did enter, no evidence was introduced to show his intent to commit a crime therein.

The store which was burglarized has an outer entranceway which is recessed. The entrance sits three feet back from the front show windows -- somewhat like a V shape, if one were facing the store; there is a one-step sill on the street side of the door. This entire recessed area and sill is outside the store.

It was only in this outside area that appellant was seen. (TR 48-49).

The only prosecution witness who testified on appellant's location in reference to the store, Officer Lawless, said that he first saw Williams emerging from ". . . the doorway to the liquor store" (TR 32) and again "I observed Mr. Williams emerge from the doorway of the liquor store, . . ." (TR 37). On cross-examination, Officer Lawless made it clear that he meant he saw Williams standing in this <u>outside</u> area. The relevant part of Officer Lawless' testimony is as follows:

> Q Do I understand that correctly, that you saw him on the sill?
>
> A On the sill, yes sir.
>
> Q Not inside the store?
>
> A No, sir. (TR 49)
>
> Q That is the first time that you saw him?
>
> A Yes, sir (TR 50)

It is thus readily apparent that no evidence was introduced to show Williams entered the store, a necessary element of the crime of burglary in the second degree.

But in the alternative; even if it could be shown that Appellant Williams entered the store, absolutely no evidence was introduced to show his intent to commit a crime therein. In

fact, on cross-examination of Williams, the Assistant U.S. Attorney (TR 101-103) attempted to show that Williams' future intent might have been; that is, what was Williams' intention if he had not yet entered the store. There appears below the relevant parts of that testimony:

Q What were you doing there?

A Standing there. I heard the police coming.

Q Just standing there?

A Yes, sir.

Q What were you doing?

A I didn't want them to shoot me. I knew he was coming; he made so much noise.

Q Were you just looking?

A Yes, sir.

Q You didn't intend to go in the store?

A Not at that moment.

Q When did you intend to go?

A The police was there and I stayed there about 15 seconds.

Q If the police hadn't come, what were you going to do?

MR. TOOMEY: (Counsel for Williams at trial)

I object to that.

THE COURT: He can testify.

THE WITNESS: It depends on my five senses what I would have done.

BY MR. FINKELSTEIN: (Assistant U.S. Attorney)

Q What would you have done?

A I couldn't say.

Q Did you intend to go in that store in any circumstances?

A Not at that moment.

Q Any later moment?

A I don't know. I can't say I was going into the store.

Q What were you doing on the sill?

A Standing there. I just came down because I seen a whole lot of commotion going on so I took it for granted they was breaking in the store. It seems like a whole lot of boys was covering the store. (TR 101-103).

This interchange clearly points up appellant's lack of intent and the prosecution's failure of proof. Our criminal statutes proscribe present conduct not future conduct. If Williams had not entered, any present intention on his part to enter cannot form the basis of a conviction. If he had entered,

he entered without possessing the requisite intent to commit a crime. There is not a scintilla of evidence to show Williams entered, or his intent to commit a crime. Appellant respectfully requests reversal of a conviction founded on such ephemeral evidence. We also urge that it was prejudicial error to allow such questioning for it permitted the jury to speculate and, in essence, find guilt based on possible prospective conduct.

B. Unauthorized Use of An Automobile

In Count 3 of the Indictment, Appellant Williams was charged with the unauthorized use of an automobile. The relevant statute specifically provides as follows:

> ". . . any person who, without the consent of the owner shall take, use, operate, or remove, or cause to be taken, used, operated or removed, . . . and operate or drive or cause the same to be operated or driven for his own profit, use or purpose . . .", 22 DCC 2204 (1967 edition).

The trial failed to produce any evidence whatsoever in any way connecting appellant Williams with the automobile in question. Two prosecution witnesses testified concerning the automobile -- Officer Lawless and the owner, Zephrie Scott.

Officer Lawless admitted he neither saw Williams near or in the automobile. The relevant part of his testimony (TR 52) follows:

Q Did you at any time, see Mr. Williams approach this automobile?

A No, sir.

Q So that at no time you saw him within the automobile, did you?

A No, sir.

His presence near the car was never proved; no fingerprints were introduced by the prosecution to show his use of the car or otherwise connect him with the theft of the car and no evidence was introduced to show he compelled or otherwise caused any other persons to use the car.

In addition, Appellant Williams was not identified as one of the perpetrators of the theft of the car (TR 7-16).

The owner of the car, Zephrie Scott, testified that he was unable to identify Williams and no evidence was introduced to connect appellant with the car. Scott at one point testified that four persons took the car, later said that three took it, and finally admitted that he didn't pay much attention, but rather passed the thieves, dropping his head and not paying much attention. The following relevant part of Scott's testimony, clearly shows the inadequacy of the prosecution's case:

Q Would you tell us what you observed, Mr. Scott, when you went back to the place you parked your automobile?

A I come out the door and I saw the door of my car open and I said somebody is in my car ---

THE WITNESS: I walked up the street and just about the time I got near the car one of the boys was in the car and had it cranked so the one--- (TR 9)

THE WITNESS: They took the car and went on.

BY MR. FINKELSTEIN: (Assistant U.S. Attorney)

Q Mr. Scott, how many people were there?

A Well, it was three was out of the car because--- two boys and one girl.

Q Could you recognize any of the people if you ever saw them?

A No.

Q Can you describe them at all for us as best you can recollect?

A Well, they looked to be in their teens because I didn't pay much attention to them because I just dropped my head and kept walking. . . (TR 10)

Q When you came back to the car, tell us again what you observed?

A When I come out the door I observed the door of my car was opened and it was four people standing on the outside and one was inside.

Q Who was the man inside?

A I don't know, I couldn't see.

Q Was Mr. Williams-----would you stand? (Defendant Williams stands).

Q Was it this gentleman?

A I couldn't identify him. (TR 15-16)

It is thus patently obvious that the prosecution did not introduce any evidence to connect Williams with the theft of the car or with its use. Further, no connection is made between Williams and the presence of the liquor in the car. On all these essential points the evidence was totally insufficient to sustain a conviction.

C. Petit Larceny

On the final count of the indictment appellant was convicted of Petit Larceny, 22 DCC 2202 (1967 edition) which requires a felonious taking and carrying away any property of value of less than $100. No prosecution witness was in any way able to associate appellant Williams with the taking of any property or its presence in the automobile. Officer Lawless admitted on cross-examination that Williams was not found with any of the stolen property. The relevant part of his testimony follows:

Q Did you find any alcohol or liquor on his person?

A No, sir.

Q You did frisk him?

A Yes, sir.

Q No sign of a bottle of liquor or anything of that kind?

A No, sir. (TR 52)

We urge that the only fact proven by the prosecution was that appellant was present at the scene of a crime. Based on the government's proof, we believe the Court's language in Bailey v. U.S., No. 21428, Slip Opinion, dated March 7, 1969, where presence, previous associative acts and flight was held not sufficient to sustain a conviction, particularly apt. There the Court said that that case can be no less than a "prosecution constructed from evidence which is pregnant with the probability that appellant was an innocent bystander." (Slip Opinion, page 9). We believe this language accurately characterizes the instant case.

As we believe the excerpted testimony above clearly demonstrates, absolutely no evidence was introduced to connect Williams with the theft of the car or the theft of the liquor. We urge that appellant's conviction must fail for lack of such evidence.

II. THE EVIDENCE WAS INSUFFICIENT TO PROVE APPELLANT WILLIAMS AIDED AND ABETTED THE ACTUAL PERPETRATORS OF THE ACT.

As Judge Sirica stated in his instructions ". . . mere physical presence by a defendant at the time and place of the commission of an offense, is not in and of itself, sufficient to establish the guilt of a defendant," (Tr. 149-150) and as this Court said in Bailey v. U.S., No. 21428, Slip Opinion, dated March 7, 1969, at page 6, "An inference of criminal participation cannot be drawn merely from presence; a culpable purpose is essential."

Further, as stated by this Court in Bailey:

> "A sine qua non of aiding and abetting, however, is guilty participation by the accused. 'In order to aid and abet another to commit a crime it is necessary that a defendant in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seeks by his action to make it succeed.' (Slip Opinion, page 5) 1/

1/ Hicks v. U.S., 150 U.S. 442, 449-51 (1893); Long v. U.S., 124 U.S. App. D.C. 14, 20-21, 360 F. 2d 829, 835-36 (1966); Kemp v. U.S., 114 U.S. App. D.C. 88, 89, 311 F. 2d 774, 775 (1962). See also the recent decision in Williams v. U.S., D.C. App. No. 4803, 4804, June 30, 1969, 97 Washington Law Reporter, 1301, 1306, where the District of Columbia Court of Appeals stated: ". . .[M]ere presence at the scene of a crime, without more, cannot support a conviction of aiding and abetting.

In the instant case there is a conflict of testimony as to whether appellant ran. Officer Lawless said he did, but Williams denied this. That Williams did not run was corroboated by the only other defendant who took the stand, Fowler (Tr. 103-105, 125, 130). But nevertheless flight, in and of itself, does not raise a presumption of built. As this Court said in Bailey,

> The Government contends finally that the strength of its case against appellant was enhanced by the fact that appellant fled the scene after the crime was committed. The evidentiary value of flight, however, as depreciated substantially in the face of Supreme Court decisions delineating the dangers inherent in unperceptive reliance upon flight as an indicium of guilt. We no longer hold tenable the notion that "the wicked flee when no man pursueth, but the righteous are as bold as a lion."
>
> The proposition that "one who flees shortly after a criminal act is committed or when he is accused of committing it does so because he feels some guilt concerning that act "is not absolute as a legal doctrine" since it is a matter of common knowledge that men who are entirely innocent do sometimes fly from the scene of a crime through fear of being apprehended as the guilty parties, or from an unwillingness to appear as witnesses. (Bailey, Slip Opinion, page 8)

In the Bailey case the appellant spent some of the afternoon of the date of the robbery in the vicinity of the Center Market Provisions Company, a wholesale meat distributor. He was seen across the street with a man who was to become the

principal robber. A bookkeeper from the company walked to his car which was parked next to a truck with a bag containing the day's cash receipts. The appellant and the robber were at the truck and the robber took the bag with the deposit at gunpoint. Appellant, just prior to the holdup, had walked a few steps away from the robber. A truck driver nearby yelled ". . . they're robbing him" and both men ran. Bailey, supra, at 2-3.

On these facts, this Court in Bailey held as follows:

> [This case is] . . . devoid of evidence, beyond what the previous associative acts and the subsequent flight might themselves reflect, that appellants presence on the scene was designed to in any way sanction or promote the robbery.

In the instant case, unlike Bailey, there is no evidence of previous associative acts. Rather, there is mere presence and disputed flight. The trial judge in this case recognized that this evidence was not enough to allow the conviction of defendant Daniels to stand, and we urge that it was even less so as to defendant Williams.

> . . . it has been held that the mere fact that one is present at the scene of a crime, even though he may be in with the person committing it, will not render him an aider and abettor. (Emphasis added) Johnson v. U.S., 195 F. 2d 675, 676 (8th Cir. 1952) as quoted in Allen v. U. S., 257 F. 2d 188, 190 (1958) (dissent)

Even the element of sympathy referred to in the Johnson case has not been proved in the present case.

Comparing the facts of the present case to the facts in Bailey, it appears that the prosecution has here proved far less than Bailey. This conviction is founded upon mere presence at the scene and flight. This evidence is clearly insufficient.

We repeat, the instant case can be no less than a "prosecution constructed from evidence which is pregnant with the probability that appellant was an innocent bystander". Bailey, slip opinion at 9.

III. THE LOWER COURT ERRED IN DENYING APPELLANT'S MOTION FOR A JUDGMENT OF ACQUITTAL

Appellant Williams moved for a directed verdict 2/ before trial (Tr. 6); for a judgment of acquittal after the close of the prosecution's case in chief (Tr. 88-89); and renewed these motions at the close of the defendant's case in chief (Tr. 132). The appellant contends here that these motions should have been granted.

2/ Rule 29 (a) Federal Rules of Criminal Procedure, 18 U.S.C.A., abolished motions for a directed verdict. Motions for a judgment of acquittal shall be used in their place.

Rule 29 (a) Federal Rules of Criminal Procedure, 18 U.S.C.A., provides that a motion for a judgment of acquittal may be entered

> . . . after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses, (charged in the indictment or information [sic]).

The motion for a judgment of acquittal is thus a prerequisite to challenge the sufficiency of the evidence. In this jurisdiction that standard which must be applied by the trial judge in deciding whether to submit a case to the jury is

> . . .whether reasonable jurymen must doubt or whether, on the other hand, the evidence was such that a reasonable mind might fairly have a reasonable doubt or might not have such doubt. (emphasis original) Crawford v. U. S., App. D. C. 156, 375 F. 2d 332, 334 (1967)

It is thus necessary to view the evidence in the light most favorable to the Government and then make a determination whether a reasonable juror might have a reasonable doubt as to the existence of any essential elements of the crime. Austin v. U.S., 382 F. 2d 129, 138 (1967), Curley v. U.S., 81 U. S. App. D.C. 389, 392, 394-395 (1947), cert. denied 331 U.S. 837, 67 S. Ct. 1511 (1947).

> . . . it is the task and conscience of a judge to transcend emotional momentum with reflective analysis. . . [and if]

> the jury would only speculate and surmise, without any basis in testimony or evidence . . .[then] . . . the motion for acquittal is [proper] to avoid such improper and unfounded conjecture, Austin, supra, at 138, 139.

This jurisdiction has recognized the setting aside of criminal convictions on appeal because of the insufficiency of the evidence and has used this "neither novel nor frightening power" to strike aside speculation and deliberation by a jury after the fact, Hemphill v. U.S., ___ U. S. App. D. C. ___, 402 F. 2d 187 (1968). It is the contention of the appellant here that the judge erred in allowing the jury the opportunity to operate beyond its province.

> The jury might not be permitted to conjecture merely, or to conclude upon pure speculation or from passion, prejudice or sympathy. The critical point in this boundary is the existence of a reasonable doubt as to guilt. Curley, supra, at 232.

Appellant contends that as a matter of law, reasonable jurymen must necessarily have such a doubt. The trial judge should have required acquittal. No other result was permissible within the fixed bounds of jury consideration, Campbell v. U.S., ___ U. S. App. D.C.___, 316 F. 2d 681, 683 (1963); Cooper v. U.S., 94 U. S. App. D.C. 343, 218 F. 2d 39 (1954).

In the case at bar, viewing the evidence in the light most favorable to the Government, the following is obvious:

1) Sometime during the night of April 27-28, 1968, a 1964 blue Chevrolet Impala, D.C. Tags 54-444, belonging to Zephrie Scott was parked at 449 N Street, N.W. The vehicle was subsequently stolen between 1 and 1:30 A.M. (Tr. 7-16). Scott saw the offenders, but was unable to identify them and specifically was unable to identify appellant Williams (Tr. 15-16). At one point witness Scott indicated he saw two boys and one girl at his car (Tr. 10), later said he saw "four people standing on the outside and one was inside"(Tr. 15). Scott most significantly admitted he paid no attention to those persons taking his car. He testified: ". . . I didn't pay much attention to them because I just dropped my head and kept walking." (Tr. 10).

2) During the early hours of April 28, Jacobson's Market Liquor Store, owned by the MRY Corporation, was broken into (Tr. 16-24).

3) Defendant Williams was arrested with three others as he emerged from the recessed sill <u>in front of</u>, <u>but not in</u> the store (Tr. 29-34, 48-50).

> Q. Do I understand that correctly, that you saw him on the sill?
>
> A. On the sill, yes sir.
>
> Q. Not inside the store?
>
> A. No, sir (Tr. 49)
>
> Q. That is the first time that you saw him?
>
> A. Yes, sir (Tr. 50)

4) The blue Chevrolet Impala described above was parked in front of the store and two cases of liquor were found in the rear seat of the car (Tr. 39).

There is no evidence to indicate Appellant Williams ever entered the store; no liquor was discovered on his person; he was not seen to approach the automobile (Tr. 64-66); there was no evidence to connect Williams with the automobile or the liquor, no evidence to show he ever entered the liquor store (an essential element of burglary) and no evidence to show that he was even known to the other defendants so that he might be considered to have aided and abetted the perpetrators of the crimes.

The only other inculpating evidence is that of his flight, ignoring for a moment the evidentiary conflict concerning whether or not Williams did flee. Judge Sirica on March 28, 1969, indicated that his denial of appellant Williams' Motion for Acquittal was prompted by his presence within the store (Page 4, Supplemental Transcript of March 28, 1969). This was an erroneous conclusion since Officer Lawless specifically testified that Williams was never in the store (Tr. 52) only emerging from the vestibule which is not part of the store.

We submit that on the basis of this evidence reasonable jurymen must, of necessity, have a reasonable doubt of the guilt of the accused. The trial judge erred in denying appellant's motion for a judgment of acquittal.

IV. THE TRIAL JUDGE'S INSTRUCTIONS WERE INADEQUATE TO DELINEATE THE STANDARD OF REASONABLE DOUBT.

The standard that has previously been applied by this Court to review the validity of the judge's instructions to the jury is whether taking the instructions as a whole the Court can find error "affecting substantial rights", Austin v. U. S., supra, at 140, Rule 52(a) Fed. R. Crim. Proc. 18 U.S.C.A. The trial court (Tr. 135-155) did not properly instruct the jury as to the burden on the Government to prove guilt beyond a reasonable doubt. This was properly objected to (see Tr. page 155). In addition, the Court did not correctly define the standard a jury must apply before finding a conviction based upon guilt beyond a reasonable doubt.

Initially, the trial judge (Tr. 137) outlined the standard charge describing reasonable doubt as previously approved by this Court in Scurry v. U.S., 120 U.S. App.D.C. 374, 347 F. 2d 468, 469 (1965), cert. denied 389 U.S. 883, 88 S. Ct. 139 (1965) and in accord with the law Holland v. U.S., 348 U.S. 121, 140, 75 S. Ct. 127, 99 L. Ed. 150 (1954);

Moore v. U. S., ___ U. S. App. D.C. ___, 345 F. 2d 97 (1965). As Judge Sirica instructed (Tr. 137), "it is a doubt as would cause a reasonable person to hesitate or pause in the graver or more important transactions of life. . . it is a doubt which is, as I said, based on reason."

This, of course, as an abstract principle of law is difficult for a lay jury to comprehend. Realizing this, Judge Sirica embarked on what he considered a "simple illustration" to "help a group of laymen" (Tr. 137) understand and apply this principle. He said that what he meant by the "graver or more important transactions of life" are matters relating to one's own personal affairs, such as "changing your position or moving out of the city or going on a trip, or buying a mink coat or a beautiful dress for your wife or a suit for your husband." (Tr. 138). The Judge then created a hypothetical situation of a young couple in a tight financial situation, living on a budget. The wife desires to buy a new Pontiac automobile; she tells her husband. The husband describes to the wife what money they have available, what their obligations are and the like. They decide not to buy -- not to act. This pausing, hesitating, whether to act or not in this matter, said the lower court judge, was what he meant by reasonable doubt.

We submit that the equating of reasonable doubt with a hesitation to act in matters of such insignificance as buying a car deprived the appellant of the reasonable doubt benefit.

Reasonable doubt has been defined as "such a doubt as in the graver, more important transactions of life would cause an ordinary and prudent person to hesitate and pause." Scurry v. United States, 347 F. 2d 468 (D. C. Cir. 1965), petition for rehearing denied, and cases cited therein. On the other hand, it is improper to equate reasonable doubt with a "willingness to act . . . in the more weighty and important matters in your own affairs." Scurry, supra.

It has been stated that a reasonable doubt cannot be equated with a "willingness" to act in the more weighty and important matters in one's affairs because:

> A prudent person called upon to act in an important business or family matter would certainly gravely weigh the often nearly balanced considerations and risks tending in both directions. But, in making and acting on a judgment after so doing such a person would not necessarily be convinced beyond a reasonable doubt that he had made the right judgment. Human experience, unfortunately, is to the contrary. Scurry v. U. S., supra, at 470.

How can a juror truly appreciate the hesitation or the pause he must overcome in order to convict a defendant? We submit that he cannot truly appreciate the hesitation he must overcome if the choice is presented in such a manner that he would be likely to act despite some doubt -- and a insignificant personal problem such as buying a new car presents a case in which a person might well be willing to act despite some doubt -- in essence, the statement by the judge in this case that the grave and important personal decision contemplated by the rule was whether one would buy a new car effectively transformed the "hesitation" rule into a "willingness" rule. The hesitation which a juror must understand cannot be conveyed by a trivial example of whether one should buy a new car -- too often such a decision would be dictated by whim -- one is likely to act despite some doubt.

The hesitation is minimal because of the insignificance of the situation and hence deprives an accused of the benefit of the concept of reasonable doubt.

CONCLUSION

For the foregoing reasons the judgment of the District Court should be reversed and remanded with

instructions to enter a judgment of acquittal.

Respectfully submitted,

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Dated August 4, 1969

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

United States Court of Appeals
for the District of Columbia Circuit

FILED SEP 22 1969

Nathan J. Paulson
CLERK

No. 23,048

UNITED STATES OF AMERICA, Appellee,

v.

AARON W. WILLIAMS, Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR APPELLANT

I. Appellee's Admission as to the Insufficiency of the Evidence on Two Counts

Appellant was convicted below on three counts -- unauthorized use of an automobile, petit larceny, and burglary in the second degree. The appellee in its Brief herein urges only that the evidence was sufficient as to the burglary count (Appellee's Brief, page 5) and nowhere urges the sufficiency of the evidence as to the other counts. In fact, as to the others appellee states:

> "Concededly, evidence adduced at trial against appellant on the petit larceny and unauthorized use of a vehicle charges was weaker than that presented on the burglary charge." (Footnote 4, Appellee's Brief, page 5).

Continuing, appellee notes that the trial judge after a review of the record denied appellant's motions for a judgment of acquittal and then states:

> "Since appellant's sentences on all three counts are concurrent, the Court, as a matter of judicial convenience, need not consider the sufficiency of evidence on the petit larceny and unauthorized use of a motor vehicle charges." (Citing Hirabayshi v. United States, 320 U.S. 81, 85, 105 (1943) and directing the reader to compare (cf) Benton v. Maryland, 395 U.S. 784, 89 S. Ct. 2056 (1969).

We would assume that this Court would reverse as to the unauthorized use and petit larceny counts simply because the appellee has not urged the sufficiency of the evidence on these counts. But if the Court will not rely solely on the appellee's failure to address itself to the evidence on these two counts, we urge that the fact of concurrent sentences should not prevent this Court's review of the evidence, contrary to the argument made by appellee.

The Benton case, cited by appellee in the footnote quoted above, strongly and forcefully narrows the scope of Hirabayshi and holds that "there is no jurisdictional bar to consideration of challenges to multiple convictions, even though concurrent sentences were imposed." Benton, supra at 88 S..Ct. 2061. Benton does preserve the discretion of a federal appellate court in deciding that it is "unnecessary" to consider all the allegations made by a particular party, and further notes "the concurrent sentences rule may have some continuing validity as a rule of judicial convenience." Benton, supra at 88 S. Ct. 2061 (emphasis supplied).

Appellant contends the exercise of such discretion would not be appropriate here. As the Supreme Court noted in Sibron v. New York, 392 U.S. 40, 55, 88 S. Ct. 1889, (1968)

> "[It is] the obvious fact of life that most criminal convictions do in fact entail adverse collateral legal consequences."

This case is pregnant with such possibilities. These three convictions, based on similarly inconclusive evidence constitute all the criminal convictions of appellant Williams.

As the Supreme Court said in U.S. v. Morgan, 346 U.S. 502, quoted in Sibron, supra: at 55, 88 S. Ct. 1899:

> "Subsequent convictions may carry heavier penalties, civil rights may be affected. As the power to remedy an invalid sentence exists, we think, respondent is entitled to an opportunity to attempt to show that this conviction was invalid."

It is well known that service of a sentence is not the exclusive consequence of a conviction.

> "Some states, for example, consider all prior felony convictions for the purpose of increasing sentences under habitual criminal statutes. In these states, the so-called 'recidivism law' is operative even though the convictions constitute only separate counts in a single indictment arising out of the same situation. Another adverse consequence facing a multiple offender is the possibility that at some future trial, both the invalid and valid convictions may be used to impeach his credibility." Cramer, "Concurrent Sentence Doctrine Limited," 36 D.C. Bar Journal, Nos. 6-9, pp. 46, 50.

The possibility of adverse collateral legal consequences exist here and the appellant respectfully requests that if the Court will not be persuaded by the appellee's failure to urge sufficiency of the evidence as to the unauthorized use and petit larceny counts, it review the evidence despite the fact that the sentences are concurrent. Appellant urges that he satisfactorily demonstrated the insufficiency of the evidence on these two counts (Appellant's Brief, pages 11-16).

II. Appellee has failed to show the existence of the essential elements of burglary - namely entry and intent - and has failed to prove that appellant aided and abetted, having shown nothing more than mere presence at the scene and disputed flight.

Appellee attempts to sustain the denial of appellant's motion for judgment of acquittal as well as the sufficiency of the evidence to convict on the burglary count on the basis of the following evidence:

> "Responding at approximately 4:00 a.m. to a radio run for breaking into a liquor store, Officer Lawless observed appellant emerge from the doorway of the looted store and flee (Tr. 30-32). Seeing that the store's front door had a four-and-one-half-foot hole in it, Officer Lawless, by drawing his gun, halted appellant (Tr. 32-33, 50, 56). The officer than saw appellant's companion climb out through the liquor store door and saw defendant Fowler inside the store (Tr. 33).
>
> "Clearly, viewing the preceding evidence cumulatively, appellee respectfully submits it was sufficient to justify appellant's burglary conviction as either a principal or an aider and abettor." (Appellee's Brief, page 6).

As appellee's description of the evidence makes clear, there was no evidence to show that appellant entered the store in question. It therefore goes without saying that there was no evidence that he entered the store with intent to commit a crime. Both of these elements are essential to convict one of burglary in the second degree (Appellant's Brief, page 7). The appellee has described the evidence as to appellant's whereabouts at the scene as "emerge from the doorway" (Appellee's Brief, page 6) conveniently ignoring the fact that on cross-examination of the only prosecution witness able to address himself to this question, Officer Lawless, the witness clarified what he meant by "emerge from the dooway" and admitted that he saw appellant on a sill outside the store and that he did not see appellant inside the store (Appellant's Brief, page 8).* Because of the complete absence of evidence on entry and intent, we urge that appellant's conviction for burglary as a principal could not stand.

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* On this question, the appellee appends the Memorandum and Order of Judge John J. Sirica on March 28, 1969 denying appellant Williams' motion for a judgment of acquittal but nowhere does appellee refer to the proceedings which took place that same day when Judge Sirica explained his reasons for the order. At that time, appellant respectfully contends, Judge Sirica erroneously concluded that the evidence had shown that "Williams was found coming out through a store that had been broken into and started running down 10th Street..." (Supplementary transcript of March 28, 1969, page 4). Appellant respectfully submits that this was an erroneous conclusion since no evidence was adduced to indicate that Williams was ever in the store. (TR 49-52, See Appellant's Brief, pages 7-9). This is only indicative of the confusion generated from Officer Lawless' characterization.

Addressing itself to the alternative argument that appellant's burglary conviction might be sustained as an aider and abettor, the appellee relies on the evidence quoted above at page 4, taken from appellee's brief at page 6. In essence appellant states that presence and flight are sufficient to sustain a conviction as an aider and abettor. To support this argument appellee relies principally on the case of Long v. United States, 124 U.S. App. D.C. 14, 20, 360 F. 2d 829, 835 (1966).* The differences in the two cases are so great as to make them incomparable.

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* The appellee also refers to the case of Nye and Nissen v. United States, 336 U.S. 613 (1949) for the proposition that to be an aider and abettor "it is only necessary that the defendant knowingly associate himself in some way with the criminal venture. . . ." That case involved the indictment of the one Moncharsh for presenting false invoices to the War Shipping Administration, misrepresenting the weights, grades and prices of specified sales of eggs and cheese. In holding that Moncharsh was an aider and abettor the Court referred to the following facts:

> "There is no direct evidence tying Moncharsh to the six false invoices involved in the substantive counts. Yet there is circumstantial evidence wholly adequate to support the finding of the jury that Moncharsh aided and abetted in the commission of those offenses. Thus there is evidence that he was the promoter of a long and persistent scheme to defraud, that the making of false invoices was a part of that project, that the makers of the false invoices were Moncharsh's subordinates, that his family was the chief owner of the business, that he was the manager of it, that his chief subordinates were his brothers-in-law, that he had charge of the officer where the invoices were made out.
> "Those activities extended throughout the period when the substantive crimes were committed. They constitute ample evidence in a record reeking with fraud that Moncharsh was associated with the presentation of the six false invoices."

Certainly that evidence amounted to a knowing association. We cannot believe that the evidence quoted at page 4 infra, taken from appellee's brief, could be similarly construed. The evidence in the instant case, we submit, suggests nothing more than a situation where defendant and his companion were returning from a party, saw activity at a liquor store and were too curious for their own good.

In the Long case three persons, including appellant Huff, had been convicted of felony murder. The evidence showed that the three defendants and two others had driven around for an hour, with Huff driving the automobile. They stopped the automobile on Kalorama Road and three emerged with Huff and another staying in the automobile. Two of the three who emerged carried weapons, one a shotgun and the other a revolver. They accosted a victim and two shots rang out. Two of the men then returned to the automobile, but one of these two later returned to take the victim's wallet. The money in the wallet was then divided up among the five. One of the questions on appeal involved the question of whether the evidence as to Huff's being an aider and abettor was sufficient to allow the case against Huff to go to the jury. In holding that it was sufficient, the Court noted that testimony had been presented to the effect that Huff drove the car to the scene of the crime, stayed nearby in the car while the others were attacking the victim, then drove the car away from the scene "fully aware of what had taken place." The Court of Appeals held that evidence sufficient to send to the jury on the question of aiding and abetting and it was that evidence that prompted the Court's statements, quoted by appellee herein, that to be an aider and abettor "it is only necessary that the defendant knowingly associate himself in some way with the criminal venture. . . ." and further, "mere presence would be enough if it is intended to and does aid the primary actors."

We cannot imagine how one could compare the Long case with this case which involved nothing more than a defendant standing on the outside doorway of a looted store, fleeing when accosted by the police.

In the Brief herein appellant had relied heavily on the case of Bailey v. United States, D.C. Cir., No. 21,428, decided March 7, 1969, as establishing that mere presence is not enough to sustain a conviction as an aider and abettor (Appellant's Brief, pages 16-19). In the Bailey case this Court said that presence, previous associative acts and flight were not enough. Rather, said this Court, there must be evidence that presence was designed to in any way sanction or promote the crime. (See Appellant's Brief, page 18).

The Government seeks to distinguish the Bailey case (Appellee's Brief, Footnote 6, page 6) on the basis of Bailey's being a daytime robbery. Is there not as much compelling reason for an innocent man to flee the scene of the crime during the day as in the nighttime? Considering the attending circumstances of extensive rioting and looting coupled with a variety of well documented confrontations between the police and citizens of the District of Columbia, is it not understandable, if not reasonable, for an innocent man to flee? This can be no more than ". . . a prosecution constructed from evidence which is pregnant with the probability that appellant was an innocent bystander." (Bailey, supra, slip opinion at 9).

III. Finally, appellee argues that the trial court's instruction on reasonable doubt was proper. (Appellee's Brief, pages 7-8).

The appellant contends that Judge Sirica's representation of the reasonable doubt standard through the use of a "simple illustration" was improper. Upon a consideration of the instruction as a whole, this erroneous illustration is by far the most outstanding portion. It is this erroneous guide which was dominant in the jury's mind. This erroneous illustration, albeit designed to help a group of layment understand the abstract legal principal of reasonable doubt (TR I37), resulted in the defendant being denied the benefit of the concept of reasonable doubt.

Conclusion

For the foregoing reasons the judgment of the District Court should be reversed and remanded with instructions to enter a judgment of acquittal.

Respectfully submitted,

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September 22, 1969

CERTIFICATE OF SERVICE

I hereby certify that I have this 22nd day of September, 1969 sent a copy of the foregoing Reply Brief for Appellant by official United States mail to the office of the United States Attorney for the District of Columbia, Washington, D.C.

Donald J. Mulvihill